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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1724

JOHN RUSSELL KARNAP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JOHN RUSSELL KARNAP, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, John Russell Karnap, prays that a writ of certiorari issue to review the decision of the United States Fourth Circuit rendered in this cause on April 20, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported but is reported at 6 SSLR 3196.

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on April 20, 1973. A timely petition for rehearing was denied on May 22, 1973 and this petition

for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Should documents prepared by the government in contemplation of a criminal prosecution be admissible as government documents or business records especially when prepared by an anonymous source whose personal knowlege of the truth thereof is unknown?

2. May the corpus delecti of a crime be proven solely by the introduction of business records or official documents made in preparation for criminal prosecutions?

3. As a matter of law, may criminal wilful neglect exist absent actual knowledge of a duty?

4. Is "individualized" sentencing constitutionally required?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

United States Code, Title 50, Appx. Section 462:

> "(Any person) who evades or refuses registration or service in the armed forces or any of the requirements of this title . . . shall, upon conviction in any district court of the United States of compe-

tent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

United States Code, Title 28, Section 1732:

"Record made in regular course of business . . ."

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum of record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter."

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but such circumstances shall not affect its admissibility.

United States Code, Title 28, Section 1733:

"Government records and papers . . ."

"(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept. . . ."

Criminal Procedure for District Courts, Rule 27:

"Proof of official record."

"An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

STATEMENT OF THE CASE

John Russell Karnap was named in a two-count indictment charging two violations of Title 50, Appendix, United States Code, Section 462(a). Count One stated that on January 4, 1971 the Petitioner failed to report for an armed forces physical examination and Count Two stated that he failed to report on February 1, 1971 for induction into the armed forces. On May 30 and 31, 1972 the case was tried before Chief Judge Sidney L. Christie and a jury; a verdict of guilty was returned as to both counts of the indictment.

The only evidence relevant to the aforementioned charges were entries in the Petitioner's Selective Service file. Two documents were introduced (over objection) from the file—a "Physical Examination List" and a "Delivery List"—on which appeared an "X" mark opposite the defendant's name in the column headed "Failed to Report". These two documents were executed at the Armed Forces Entrance and Examination Station (AFEES) by a person acting in an unspecified capacity who is not shown to have had personal knowledge of the contents of the documents; they were later transmitted to the local board. A Selective Service Form 100, a document prepared from the two AFEES documents, also indicated the Petitioner "did not report". These documents were prepared in contemplation of criminal prosecution (App. B, p. number 1) A witness testified that she was the custodian of the file and she concededly had no knowledge about the preparation or truthfulness of the AFEES forms.

The Petitioner received a notice of an order to report for a physical examination by mail at 203 Green Oak Drive, Huntington, West Virgina (his parent's home)

in December of 1970; the records show that a similar order had been mailed to Mr. Karnap's last reported address (in New York), but was returned as "Unclaimed". On January 12, 1971, the local board mailed an Order to Report for Induction at the West Virginia address by registered mail, return receipt requested, with the notation of "Deliver to Addressee Only"—this was the only order to report for induction the local board mailed. The January 12, 1971 induction order mailing was returned to the local board on February 1, 1971 as "Unclaimed".

Mr. Karnap was convicted on both counts and was sentenced to three years imprisonment on each count, to be served concurrently. Judge Christie, in a pretrial conference, stated that he had agreed with the other judges in his district that a three year sentence was appropriate in Selective Service cases so that the offender would serve as much time in prison, one year, as his tour of service in Viet Nam would have been. (See Appendix B, number 1 and 2) for a reproduction of Judge's comments.)

REASONS FOR GRANTING THE WRIT

I

This case affords an opportunity for this Court to rule that documents prepared in contemplation of a criminal trial (drafted by one agency and forwarded to another) are not admissible as official documents or business records or, at minimum, that such documents are not admissible in the absence of a showing of personal knowledge of the contents thereof in an identified person. The Court will thereby decide on the important question of federal law which has not been but should be settled by this Court and will resolve a conflict of opinion in the circuits.

A. Information Obtained by Non-Selective Service Personnel In Contemplation of a Criminal Prosecution Should Not be Admissible Under 28 U.S.C. Sections 1732 and 1733.

The entries on the Physical Examination List and the Delivery List, which were the sources of information for the entries on the Selective Service Form 100, were executed by non-selective service employees in contemplation of a criminal prosecution. They constituted a "viewing" of alleged criminal acts by prospective government witness and as such cannot fairly be considered proper exceptions to the hearsay rule.

The Petitioner realizes that a watershed is being reached by this Court in the Confrontation-hearsay area; this point is underscored by Justice Harlan's concurrences in *California* v. *Green,* 399 U.S. 149, 172 (1970) and *Dutton* v. *Evans,* 400 U.S. 74, 93 (1970). The Petitioner also recognizes the existence of valid policy reasons for normal government document-business record exceptions to the hearsay rule as "convenience" and "obvious trustworthiness." The line, however, must be drawn at admitting documents prepared in contemplation of criminal prosecution. Entries made by one government agency notifying another that a law has been violated are not in the nature of census reports, meteorological data, ship-logs or even hospital records. Rather, the entries on the Delivery Lists or Physical Examination lists, or records prepared from them, are intended to constitute *direct testimony,* on the heart of an alleged criminal law violation, in which the maker, the United States government, is making a self-serving declaration against a potential defendant. *Palmer* v. *Hoffman,* 318 U.S. 109, 113-114 (1943).

"Government convenience" is an insufficient excuse for permitting the admission of hearsay-exception evidence that goes to the essence of an alleged criminal law

violation. The law has never allowed a witness to a murder to send a letter to the prosecutor and then have the prosecutor base his case upon that letter because the witness was a half an hour drive away, as in the case presented here. Neither should the law allow a government record to be introduced because of its supposed "trustworthiness" when it has been prepared in obvious contemplation of a criminal prosecution.[1]

This Court has recognized that the appearance of due process is as important as the reality of due process. *Peters* v. *Kiff*, 407 U.S. 493 at 502 (1972). It appears manifestly unfair to allow a party in a criminal case to have one of its agencies write a letter to another one of its agencies and thereby create admissible evidence not subject to confrontation. If statutes or rules of evidence allow agencies to correspond with themselves and thereby generate admissible evidence not subject to the Confrontation Clause under the rubric of "trustworthiness", and in the name of "government convenience", then the Sixth Amendment protections and due process rights are eviscerated.[2]

The fundamental and undeniable evil discussed in this section applies in all criminal prosecutions. Be-

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[1] Justice Harlan also noted in *Dutton* v. *Evans*, supra, that the purpose of 28 U.S.C., Sections 1732-1733, is to "eliminate the necessity for the production of declarants where production would be *unduly* inconvenient and of small utility to a defendant." (400 U.S. at 96); this is not the situation in the case at bar.

[2] As Justice Harlan said, "the paradigm evil the Confrontation Clause was aimed at was 'trial by affidavit' ", (400 U.S. at 94). See also: *Bruton* v. *United States*, 391 U.S. 123 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Bridges* v. *Wixon*, 326 U.S. 135 (1945); *Reynolds* v. *United States*, 98 U.S. 145 (1879); and *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971).

cause of the clarity of the record and because of the acceptance of the *Proposed Rules of Evidence for the United States Courts* and *Magistrates,* Rule 803, 56 FRD 183, 307 and 308, this case presents an excellent and timely vehicle for consideration of the issues presented.

B. The Use of 28 U.S.C. 1732 ("Business Records") In Criminal Cases.

All the information in the petitioner's file regarding his "refusals" was derived from entries made on documents by non-Selective Service personnel outside of the local board's office. Hence, the relevant information was obtained from "others". Considering a similar situation, Judge Learned Hand in *United States* v. *Grayson,* 166 F.2d 863 (2d Cir. 1948) concluded that the information received from "another" outside of the organization whose records are in question involves non-exempted multiple hearsay. Accord: *Felice* v. *Long Island R.R.,* 426 F.2d 192 (1970). Of course, the Circuit Court in this case at bar indicated that the officer at the AFEES was an "ad hoc" official of the Selective Service System. See also *LaPorte* v. *United States,* 300 F.2d 878, 881 (9th Cir. 1962). The judicial coronation of an army official as an "ad hoc" member of the Selective Service System, although imaginative, leaves the Fourth and Ninth Circuits in conflict with the properly decided Second Circuit rule.

Furthermore, the record in the case at bar contains no evidence that there was a systematic or routine procedure through which the facts and circumstances of any alleged refusal would be transmitted to the maker of the record, if he did not witness the "refusal" himself. In the absence of a showing of such

a routine there is no circumstantial guarantee of trustworthiness as required by those cases specifically considering this issue. See *United States* v. *American Radiator & Stand. San. Corp.*, 433 F.2d 174, 197 (3rd Cir. 1970) (declining to follow Sixth Circuit); *Standard Oil Company of California* v. *Moore*, 251 F.2nd 188, 215 (9th Cir. 1957); and *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). The Fourth Circuit departed from the general rule when it stated that "it is reasonable to *infer* that the third party here, the Army officer, was 'acting routinely, under a duty of accuracy, with employer reliance on the result or in short, in the regular course of business' ". (App. A, p. 3a). The gap in the evidence in the case at bar cannot be filled by an "inference".

C. The Use of 28 U.S.C., Section 1733 (Government Documents) In Criminal Cases.

It is a general rule in prosecution of the Universal Military Training and Service Act that the Selective Service file of the accused is admissible into evidence as a public document under 28 U.S.C., Section 1733. *Penor* v. *United States*, 167 F.2d 553 (9th Cir. 1948); the petitioner does not deny the existence of the general rule. However, the mere fact that the file may qualify as a public record does not *ipso facto* overcome the normal hearsay objection unless the document relates to an event to which the author of the document himself could testify. The public documents exception to the hearsay rule is only to allow the non-appearance of the public official who had personal first hand knowledge of the facts contained therein.[3] *Yaich* v. *United*

[3] It should be noted that the mere fact that documents are placed in selective service files, as required under 32 C.F.R., Section 1621.8, including anonymous hate letters or newspaper editorials (see

States, 283 F.2d 613, 616 (9th Cir. 1960); *Kemp* v. *United States,* 415 F.2d 1185 (5th Cir. 1969); and, *Yung Jin Teung* v. *Dulles,* 229 F.2d 244, 247 (2d Cir. 1956). A conflicting result was reached below and a conflict in the Circuits is seen. (*Karnap; United States* v. *Downing,* 454 F.2d 373 (10th Cir. 1972). The parameters of the conflict are fully articulated in *United States* v. *Hudson,* 6 SSLR 3009 (9th Cir. 1972) where Judge Lumbard of the Second Circuit, sitting by designation, dissented from the Ninth Circuit Judges opinion. The majority saw no need for a substantiated personal knowledge requirement in Section 1733 cases. Judge Lumbard expressed a contrary view; he would not allow a conviction based solely on the statement of an anonymous person appearing in a government record.

28 U.S.C. Sections 1732 and 1733 do not provide exceptions to the hearsay rule which would allow police records of hearsay statements into evidence. *Colvin* v. *United States,* C.A. 9, 41 L.W. 2676, June 19, 1973. The court held that Section 1732 documents must be based on first hand observation and that Section 1733 documents must be based on the recording officer's or his subordinate's personal observation. Only an army official, *and not any selective service official,* saw the "refusal" so Section 1733 does not apply in the case at bar.

Clay v. *United States,* 397 F.2d 901, 924, n.23 (5th Cir. 1968) cannot itself make all entries admissible. Similarly, even if the information comes from a government agency outside of the Selective Service System, the entries are not properly admissible as public documents unless the author is shown to have had personal knowledge of the document's contents. (Cf. *United States* v. *Knudsen,* 320 F.Supp. 878 (D. Wisc. 1971).

II

This case affords an opportunity to rule that the corpus delecti of a crime may not be established solely by the introduction of business records or official documents made in preparation for criminal prosecutions.

As noted above, the only "evidence" to show that the petitioner refused to report for a physical examination or induction was in the form of correspondence between AFEES and the local board; this "evidence" was created, of course, in *contemplation of criminal prosecution*. Hence, this question requires an articulation of minimum standard of proof in criminal cases involving exceptions to the hearsay rule. Cf. *Palmer* v. *Hoffman, supra.*

Congress did not intend to allow the hearsay exceptions to allow a trial by file. The purpose of 28 U.S.C., Sections 1732 and 1733 was to facilitate proof of *collateral* issues in a trial and not to cause people to be imprisoned on the basis of a printed form. The concept that boilerplate bureaucratic forms prepared in contemplation of criminal prosecution may suffice to establish specific intent of the corpus delicti of a crime is shocking to the conscience and is contrary to the entire history of Anglo Saxon jurisprudence. Unless this concept is immediately dispelled, indulgence in it by the lower courts will erode substantial confrontation rights. Simply stated, the government must not be allowed to secure convictions using exceptions to hearsay rules as the sole evidence especially when witnesses who observed the "crime" are available to testify and be cross-examined. This Court has not addressed itself to this issue and the lower courts have conflicting opinions on this matter.

The Seventh Circuit has recently held, in two cases, that the corpus delicti of a crime cannot be established solely by use of business records or government documents. In *United States* v. *Webb,* 467 F.2d 1041 (7th Cir. 1972)[4] and in *United States* v. *Sorrell,* 473 F.2d 1054 (7th Cir. 1973), the Seventh Circuit ruled that Selective Service files, although admissible, cannot provide the sole basis for conviction in prosecutions for failing to obey induction rules. Although an officer at an AFEES station informed the local board by letter that a prospective inductee "refused to take part in all processing" (473 F.2d at 1056) the Court held there was "simply no reliable evidence of sufficient probative value upon which to base Sorrell's conviction." (473 F.2d at 1057). In summary, *Webb* and *Sorrell* hold that even if the file is admissible, the corpus delicti in a criminal case is not established on the basis of unverified statements contained in memoranda.[5] Accord, see *United States* v. *Brady,* 4 SSLR 3126 (D. Mass. May 4, 1971). A contrary result has been reached in the Fourth Circuit below and in the Tenth Circuit, *United States* v. *Downing,* 454 F.2d 373 (10th Cir. 1972) and *Brandon* v. *United States,* 381 F.2d 727 (10th Cir. 1967). This conflict needs to be resolved so that the circuits will have a clear indication of the weight to be given to evidence admitted through exceptions to the hearsay rule in criminal cases.

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[4] The *Webb* case substantially modified or clarified two other Seventh Circuit cases on which the Karnap Court heavily relied; namely, *United States* v. *Harris,* 466 F.2d 129 (7th Cir. 1971) and *United States* v. *Holmes,* 387 F.2d 781 (7th Cir. 1968) cert. denied 391 U.S. 936. Neither *Harris* nor *Holmes* can now be read to allow a hearsay exceptions to constitute the corpus delicti of a criminal case.

[5] The defendant has no duty to rebut the case against him. The prosecution must shoulder the entire load of proving its case beyond a reasonable doubt, *Tehan* v. *Shott,* 382 U.S. 406, 415 (1966).

III

This case affords an opportunity to rule that criminal wilful neglect cannot exist absent actual knowledge of a duty. The Court will thereby resolve a conflict in the Circuits.

On January 12, 1971, the local board mailed an Order to Report for Induction to 203 Green Oak Drive, Huntington, West Virginia (his parent's home), by registered mail, return receipt requested, with the notation of "Deliver to Addressee Only." The January 12, 1971 induction order was returned to the local board on February 1, 1971 as "Unclaimed". The petitioner's last reported address was 2207 University Avenue, Brown, New York, "while he was at N.Y.U.". However, in December of 1970, during Christmastime, he had received and signed for his order to report for a physical at the West Virginia address and a similar order sent to the New York address was returned to the local board as "Unclaimed". The local board only mailed one order for induction.

The petitioner's failure to receive the Notice to Report for Induction is shown by Selective Service records as it was returned "Unclaimed". The fact that such non-receipt may have been the result of noncompliance with the duty to keep the local board advised of his address (which is not clear because the notice was not sent to his last reported address)[6] is immaterial because such noncompliance is another offense. Evidence of this nature has been directly held to be insufficient to sustain a conviction for failure to report

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The defendant should not be required to bring in the government's witnesses, being bound by their testimony, and run the risk of adverse or impeachable testimony. *Lopez* v. *United States*, 373 U.S. 427, 445 (1963), (Warren, C.J. concurring).

[6] Cf. *Bartchy* v. *United States*, 319 U.S. 484 (1943).

because the registrant did not know of his duty; any presumption of receipt because of the mailing is rebutted by the return of the notice as "Unclaimed". *United States* v. *Williams*, 421 F.2d 600 (10th Cir. 1970); *Fisher* v. *United States*, 413 F.2d 1034 (9th Cir. 1969); and see *United States* v. *Figurell*, 462 F.2d 1080 (3rd Cir. 1972) (by implication); and, *Graves* v. *United States*, 252 F.2d 878 (Cir. 1958). A contrary result was reached below where the court speculated that the Notice was "Unclaimed" because of the defendant's own conduct although only one notice to report was mailed (on January 12, 1971, to his parent's home after Christmastime) and that *not* to the last mailing address he gave to the board (the New York school address) as required by 32 C.F.R. 1641.3. (App. A, p. 5a). A similar result seems to have been reached in *United States* v. *DeNavarez*, 407 F.2d 185 (2d Cir. 1969) and *United States* v. *Preston*, 420 F.2d 60 (5th Cir. 1969). Hence, a deep division in the Circuits is seen.

IV

This case affords an opportunity for the Court to directly rule, as it has not but should, that "individualized sentencing" is constitutionally required. The Court will thereby resolve conflicting opinions in the circuits.

The sentencing judge, in a pre-trial conference, stated that he had agreed with the other judges in his district that a three year sentence was appropriate in Selective Service cases so that the offender would serve as much time in prison, one year, as his tour of service in Viet Nam would have been. The petitioner was in fact later sentenced to three years imprisonment. The

facts are clear in this case at bar[7] but the law regarding individualized sentencing is not.

This Court has indicated that it favors "individualized sentencing." For example, in *Williams* v. *New York*, 337 U.S. 241 (1949) at 247, this Court declared, "The belief no longer prevails that every offense of like legal category calls for identical punishment without regard to the past life and habits of a particular offender." Later, in *Williams* v. *Oklahoma*, 358 U.S. 576 (1959) at 585, this Court stated that the sentencing judge "is authorized, if not required, to consider all of the mitigation and aggravating circumstances involved in the crime."

The Sixth Circuit has construed the two *Williams* cases, and other cases involving due process, to mean that individualized sentencing is required. *United States* v. *Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States* v. *Charles*, 460 F.2d 1093 (6th Cir. 1972). (See also, *United States* v. *Wiley*, 267 F.2d 453 (7th Cir. 1959)) Specifically, the Sixth Circuit prohibited the mechanical imposition of a standard sentence for all violators of 50 Appendix U.S.C., Section 462. The Fourth Circuit, however, held that the petitioner's complaint about the *admittedly* mechanical sentencing of the district court was without merit. Hence, the Sixth and the Fourth Circuit have conflicting opinions on the question of mechanical sentencing and this is a question on which this Court should make a definitive ruling.

Furthermore, the mechanical imposition of a sentence to cause a person to "serve as much time in jail as he

[7] The judge did indicate probation was given in *guilty plea* cases. Hence, the issue here involves "mechanical sentencing," in non-guilty plea cases.

would have in Vietnam" is clearly retribution for its own sake. The sentence is "society's" vehicle for getting back at a person who had supposedly chosen not to go to Vietnam. This Court has "consistently denigrated retribution as a permissible goal of punishment." *Furman* v. *Georgia,* 408 U.S. 238 (1972), at p. 345 (Justice Marshall concurring).

Finally, from another perspective, it may be said that mechanical sentencing denies the accused of his right to counsel at sentencing. *Cf. Mempa* v. *Rhay,* 389 U.S. 128 (1967). If the judge has a preconceived notion or if the judges in a judicial district have agreed on the type of sentence in a given class of cases, then all of counsel's allocution at sentencing is feckless.[8] Hence, it was a useless formalism for counsel to be present and the petitioner was denied assistance of counsel at his sentencing.

CONCLUSION

The petitioner was subjected to a trial by presumption and inference and was mechanically sentenced. For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

GARY HOWARD SIMPSON
Counsel for Petitioner

Dated: June 21, 1973

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[8] In *Shepherd* v. *Florida,* 341 U.S. 50 (1951), because of pretrial publicity, the "trial was but a legal gesture to register a verdict already dictated." (341 U.S. at 51). Similarly, in the case at bar the pre-sentencing procedure and the allocution were but legal gestures prior to the imposition of a preordained sentence. In both cases the due process denials are patent.